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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. [redacted] 76

PRECISION SCIENTIFIC COMPANY,
AN ILLINOIS CORPORATION,
Cross-Petitioner,

vs.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 826.

PRECISION SCIENTIFIC COMPANY,
AN ILLINOIS CORPORATION,
Cross-Petitioner,

vs.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Cross-petitioner, Precision Scientific Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered March 15, 1956 (amending and recalling its judgment of November 10, 1955), which reversed the District Court and directed it to issue a preliminary injunction enjoining the National Labor Relations Board from decertifying respondent International Union of Mine, Mill and Smelter Workers. The Board had administratively determined that respondent was out of compliance with Section 9(h) of the National Labor Relations Act because of false non-Communist affidavits filed by Maurice

Travis, Secretary-Treasurer of the Union. The National Labor Relations Board has previously filed petition herein.

CITATIONS TO OPINIONS BELOW.

The orders of the District Court, filed February 11, 1955 and January 13, 1956 are unreported and printed in Appendix B, pp. 28-30. The first opinion of the Court of Appeals, filed November 10, 1955, printed in Appendix B, p. 31, is reported in 226 F. 2d 780. The second opinion, filed March 15, 1956, printed in Appendix B, p. 33, is reported in 37 LRRM 2702.

JURISDICTION.

The first judgment of the Court of Appeals was entered on November 10, 1955 (App. B, p. 31). On January 13, 1956, the District Court refused to enter a preliminary injunction thereon on the ground that the Court of Appeals had not decided the issues raised by the answer of cross-petitioner, and that subsequent to the order appealed from, the District Court had stricken the affidavit of respondent's attorney, Mr. Witt, in aid of injunction (App. B., p. 30). On motion of respondent, the Court of Appeals reviewed the January 13th order. On March 15, 1956, treating respondent's motion as an appeal from the January 13th order or as a petition for mandamus or as a motion to modify the judgment of November 10, 1955, the Court of Appeals recalled its previous judgment, decided the issues raised by cross-petitioner's answer, that the affidavit in aid of a preliminary injunction was adequate, and directed the District Court to enter a preliminary injunction (App. B., p. 33). The jurisdiction of the Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board can administratively investigate the compliance of an alleged labor organization with Section 9(h) of the National Labor Relations Act, where a union officer has filed a false affidavit.

2. Whether the Court of Appeals erred in dismissing as unsubstantial and frivolous defenses to the cause of action, upon which the District Court has not heard evidence or ruled, namely:

(a) Whether respondent was in court with "clean hands."

(b) Whether respondent is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

STATUTES INVOLVED.

The statutory provisions involved are Sections 2(5) and 9(h) of the National Labor Relations Act, (61 Stat. 136, 29 U. S. C. 151, *et seq.*). They are printed in Appendix A, p. 27.

STATEMENT.

The N. L. R. B. on February 4, 1954 directed an administrative investigation of Section 9(h) affidavits filed by Maurice Travis as Secretary-Treasurer of respondent. This investigation was based on facts alleged by cross-petitioner in its answer to a Section 10 unfair labor practice complaint (case No. 13-CA-1441) based upon cross-petitioner's refusal to bargain with respondent. That answer affirmatively averred:

(1) That respondent was not a labor organization "but was rather an organization for political purposes engaged primarily and solely in activities to further a political con-

spiracy and is and at all times material has been an agency of the Communist party engaged in activities in furtherance of the ends of said Communist party, contrary to the purpose and intent of the Labor Management Relations Act of 1947 as amended," and

(2) That respondent was not in compliance with Section 9(h) in that its officers had filed false non-Communist affidavits. Respondent sought unsuccessfully to enjoin the administrative investigation. (*Mine, Mill and Smelter Workers* v. *Farmer*, 218 F. 2d 42 (C. A. D. C.).)

1. The Administrative Hearing.

Hearings were held before a hearing officer of the Board between May 10 and July 14, 1954 (R. 24, 34). Respondent and Travis were represented by counsel and were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues specified in the Board's order, to argue orally, and to file briefs (*ibid*). Counsel for cross-petitioner was also permitted to appear and to participate as *amicus curiae* (R. 34). Travis not only failed to appear or to take the stand in his own behalf, but he also refused to respond to a subpoena *ad testificandum* issued at the request of the Board's General Counsel (R. 27, 36).

On September 10, 1954, the hearing officer issued his report finding, *inter alia*, that Travis' August 1949 statement disclosed on its face that his contemporaneous non-Communist affidavit filed with the Board was false; that the evidence disclosed that his subsequent affidavits were also false; and that the membership of respondent was aware of the falsity of Travis' 1949 and subsequent affidavits, yet continued to reelect him (R. 32-79). Respondent and Travis were given an opportunity to, and did, file exceptions to the report and a supporting brief. In addition,

they filed a motion for an order directing the hearing officer to withdraw his report and to conduct a further hearing (R. 25).

On February 1, 1955, the Board issued its determination and order (111 N. L. R. B. 422, R. 23-32), adopting in general the hearing officer's report. The Board's findings and conclusions may be summarized as follows:

The Travis statement, published in respondent's newspaper of August 15, 1949, admits that the sole reason for his alleged resignation from the Communist Party was "in order to make it possible for me to sign the Taft-Hartley affidavit", and that such step was taken "with the utmost reluctance and with a great sense of indignation" (R. 76). The statement then goes on to assert, *inter alia*, that the "very premise of the Taft-Hartley affidavits is a big lie"; that it is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union"; and that the "biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence" (R. 77). In addition, Travis frankly acknowledged that, despite his alleged severance of Communist Party ties, he continued to believe in "Communism", and emphasized (R. 78-79):

> I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society * * * can lead to the end of insecurity, discrimination, depressions and the danger of war.
>
> I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror.

The Board found that this newspaper statement "disclosed on its face Travis' admission of the falsity of his August 4, 1949, non-Communist affidavit" (R. 25). In arriving at this conclusion, the Board considered the meaning of the statement in the light, *inter alia*, of the undis-

puted evidence of Travis' long-established position as a member of the Communist Party; of his role as one of its leaders within the Union; and of his admission to former respondent official Mason that "the Party people" at Communist Party headquarters in New York had cleared the statement, and that "it meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (R. 26, 39-41, 60-61).

In the alternative, the Board concluded that, even when read literally, the statement constituted an admission of the falsity of Travis' 1949 affidavit (R. 26). As the Board noted (R. 27):

> It would stretch credulity beyond understanding were we required to assume that Travis had abandoned his Communist beliefs or his support of the Communist Party when he asseverates in the article "that good Communists are good trade unionists" working against the "rotten * * * foundation of the capitalistic system," and that "despite my resignation from the Communist Party, I shall continue to fight for these goals with all the energy and sincerity at my command." (See also R. 61-64).

The Board further found that the undisputed evidence showed that, subsequent to August 1949, Travis had "not altered his allegiance to nor support of the Communist Party, nor his belief in the overthrow by force and violence of this Government", and that hence his succeeding affidavits were likewise false (R. 27).[1] Thus, the uncontradicted testimony of Mason reveals that in August 1953 he requested Travis to give due recognition to the non-Communist faction in respondent and liberalize respondent's official newspaper so that it would not always reflect the Soviet side (R. 41-42). Travis' reply was that "Mason

1. This finding has subsequently been confirmed by Travis' recent conviction, under 18 U. S. C. 1001, for filing false 9 (h) affidavits. See Daily Labor Report, December 22, 1955, No. 248, p. A-3.

and his brother had a chance 'to be way up with us in these councils if you would rejoin the Communist Party'" (R. 42). Moreover, as to the paper, "Travis rejected Mason's suggestion summarily, saying 'You know as well as I do that the Party and my people will not stand for those proposals'" (R. 42-43, 64-65).

Finally, the Board found that "the Union membership was aware of the falsity of *all*[2] of Travis' affidavits" (R. 27). It based this conclusion on the "evidence of the publication, in the Union's official newspaper, of Travis' 1949 article in which he admitted the falsity of his initial affidavit, and the distribution of that newspaper to all the Union members; the fact of general awareness in this country of the true nature, aims and methods of Communism and the Communist Party; and the evidence * * * that the members of the Union were better equipped than the general public properly to evaluate Travis' 1949 newspaper article and his subsequent Communist activities" (R. 27-28). Summarizing the latter evidence, the Board pointed to "the CIO's investigation of Communist domination of the Union and its final expulsion of the Union from the CIO in 1950; the revolt of scores of locals from the Union over the Communist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits; and the resulting publicity to Union members" (R. 28, fn. 9; see also R. 43-46, 66-68).

On the basis of these findings, the Board concluded that respondent was not, and had not been, in compliance with the filing requirements of Section 9 (h) of the Act, and ordered that respondent be accorded no further benefits

2. Emphasis in original.

under the Act until it had complied with these requirements (R. 31-32).

2. The Instant Suit.

On February 10, 1955, respondent, contending *inter alia*, that the Board's determination and order were beyond its powers under the Act, filed the instant suit in the United States District Court for the District of Columbia for injunctive relief against the Board action (R. 2-7). On February 11, 1955, that court, after hearing, denied respondent's motions for a temporary restraining order and a preliminary injunction (R. 10-12). Respondent appealed the denial of the preliminary injunction to the Court of Appeals.

On February 21, 1955, the District Court granted cross-petitioner, whose obligation to bargain with respondent was affected by the Board's decompliance determination, leave to intervene as a defendant and to file an answer *instanter*, which cross-petitioner then did. That answer (R. 101-112; 16-80), *inter alia*, traversed paragraph 2 of the complaint, denying that respondent was a labor organization within the purview of the Act (R. 101-110); traversed paragraph 5 thereof denying that respondent filed affidavits required by Section 9(h) of the Act, specifically averring that if affidavits were filed they were false (R. 110); averred that respondent is an illegal and subversive organization existing in violation of the Smith Act and violative of Article IV, Section 4 of the Constitution (R. 111-112); averred that respondent was not in court with clean hands (R. 112). The Court then struck respondent's affidavit in aid of its motion for preliminary injunction with leave to file a new affidavit and to amend the complaint (R. 81-82). No affidavit or amended complaint was filed.

On April 18, 1955, the Court of Appeals granted cross-

petitioner leave to intervene as an appellee. Cross-petitioner filed briefs and argued orally on the record certified.[3] On November 10, 1955, the Court of Appeals reversed the District Court, *per curiam* (226 F. 2d 780, App. B, p. 31):

> "The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur and Leather Workers Union*, ... U. S. App. D. C. ....., 221 F. 2d 862, decided February 15, 1955.
>
> Reversed"

On January 13, 1956, hearing was had in the District Court on the mandate of the Court of Appeals. Respondent contended that said mandate required the District Court to enter a preliminary injunction. Cross-petitioner contended that all the mandate required was a reversal of the order denying preliminary injunction, and that the Court of Appeals had only decided the case upon the record before the District Court at the time the order denying the preliminary injunction was issued.[4] Cross-petitioner contended that while the issues arising in the District Court after the entry of the order appealed from had been briefed and argued, they had not been passed upon by the Court of Appeals as was evident from the opinion.[5] Thereupon the District Court vacated its order denying a preliminary injunction, refused to issue one and placed the case upon the calendar for the trial of issues not covered by the mandate of the Court of Appeals (App. B, p. 30).

On motion of respondent the Court of Appeals reviewed the January 13th order upon briefs after oral argument,

3. The record certified to the Court of Appeals contained the pleadings and proceedings before the District Court as of the time the appeal was filed, and also what had transpired in the District Court thereafter.

4. That record consisted solely of the Complaint, Motion and Affidavit.

5. Those were the issues raised by the answer and the striking of the affidavit in aid of the preliminary injunction as insufficient.

and, on March 15, 1956, treating the respondent's motion as an appeal from the order of January 13, 1956 or as a petition for mandamus or as a motion to modify the judgment of November 10, 1955, recalled the judgment of November 10, 1955, stated that all defenses raised by cross-petitioner's answer and the issue of the sufficiency of respondent's affidavit had been considered and rejected, and ordered that a preliminary injunction issue (App. B, p. 33). That preliminary injunction grants respondent substantially all the relief it could obtain upon final order (R. 6, 7-8).

REASONS FOR GRANTING WRIT.

1. The decision of the Court of Appeals is directly in conflict with that of the Sixth Circuit in *N. L. R. B.* v. *Lannom Mfg. Co.*, 226 F. 2d 194. This Court has just granted certiorari in that case (No. 723, This Term, April 23, 1956). Certiorari should likewise be granted here.

In *Lannom*, the Board petitioned to enforce its order requiring Lannom to bargain with the Fur and Leather Workers. The Board had previously found that Union out of compliance by reason of the conviction of the Union President of perjury for filing false non-communist affidavits. The Court of Appeals for the District of Columbia had enjoined the Board from giving effect to the order of decompliance (*Farmer* v. *Fur and Leather Workers*, 221 F. 2d 862). Thereupon the Board found Lannom guilty of a refusal to bargain. The Sixth Circuit refused to enforce the Board order requiring Lannom to bargain, gave effect to the Board's order decomplying the Union and refused to honor the injunction of the Court of Appeals for the District. The Fifth and Seventh Circuits indicate disagreement with the District of Columbia Circuit in *Fur and Leather Workers* (*N. L. R. B.* v. *Vulcan Furniture*

Mfg. Corp., 214 F. 2d 369, 371, cert. denied, 348 U. S. 873; *American Rubber Products Corp.* v. *N. L. R. B.*, 214 F. 2d 47, 55).

The Board's decompliance order in *Fur and Leather Workers* was based solely upon the conviction of perjury. It held no administrative hearing, as it did here, in which full opportunity was afforded respondent to be heard. Thus, at bar, the issue of the Board's power to administratively investigate a union's compliance with 9(h) is squarely presented without collateral issue pertaining to Board procedure.

2. The public interest in a determination of the power of the Board to investigate and enforce union compliance with 9(h) is recognized by this Court in *Lannom*. But, settlement of this question goes beyond *Lannom*, and, indeed, beyond the case at bar, since it is likely to be presented in almost every Board proceeding involving a Communist-led union. In this light, certiorari should be granted here to foreclose the possibility that decisive collateral issues in *Lannom* will preclude consideration of the main issue, the Congressional intent in enacting 9(h): "to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party" (*N. L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325). Is the Board intended to be merely a filing cabinet for false affidavits?

The purpose of 9(h) is to eradicate Communism from the labor movement. "(T)rade unions which are guided by officers who are committed by ties of membership to the Communist party must forego the advantage of the Labor-Management Relations Act" (*A. C. A.* v. *Douds*, 339 U. S. 382, 418). To deny that false non-Communist affidavits are a subject for Board inquiry is to make the statute ridiculous. It would permit unions which file false affida-

vits to gain the sanctions of federal law by fraud, would place a premium upon that fraud and stamp with Congressional approval only those Communist led unions whose leaders are also perjurers.

3. The decision of the Court of Appeals conflicts with the principles of statutory construction laid down by this court in *N. L. R. B.* v. *Dant*, 344 U. S. 375. The Court of Appeals has ignored the paramount rule that the intention of Congress is best found in the language of a statute. It reads into 9(h) language that isn't there, to frustrate rather than further the purpose of the statute.

In determining the meaning of 9(h), one should first carefully examine its language. What it says and *what it does not say* should be digested before recourse is had to other materials purporting to illumine congressional intent. 9(h) does not say that if affidavits are on file:

> (1) The Board may not investigate their truth or falsity apart from a Section 9 proceeding, or after complaint has issued under Section 10;
>
> (2) That the "union" filing them is a labor organization, as defined in Section 2(5), even though its officers are members of the Communist Party, and its policies and practices are dictated by that Party.

The Court of Appeals engrafted (1) on 9(h), and characterized an argument questioning (2) as "frivolous".

Out of the abundant Congressional hearings, debates, reports and court decisions prior to 9(h) emerges clearly one thing: Congress was aware of the grave danger to our national safety presented by unions whose officers were members of the Communist Party. It had been at least since 1940 when it passed the Smith Act. That Act received its attention while it was considering Taft-Hartley (Senator Aiken, 93 Cong. Rec. 5085).

Congress was in such mood at the time 9(h) was passed that both the original House and Senate Bills prohibited

the *certification* of any labor union if its officers were members of the Communist Party (H.R. 3020, 80th Cong., First Sess.; 1 Legislative History, L.M.R.A. 1947, 63, 190). But this posed a real problem in administration, for certification is the concluding step in a representation proceeding under Section 9, as Congress well knew. That representation proceeding is a very limited investigation looking toward an election and subsequent certification (*N. L. R. B.* v. *Botany Worsted Mills*, 133 F. (2d) 876, 882, cert. denied, 319 U. S. 751), is non-adversary in character (*Inland Empire Council* v. *Millis*, 325 U. S. 697, 706) and the certification neither creates rights or imposes duties (*United Employers Assn.* v. *N. L. R. B.*, 96 F. (2d) 875, 876). Only in a Section 10 proceeding, after a complaint has issued, may certification be tested, and then only by an employer (*Norris, Inc.* v. *N. L. R. B.*, 177 F. (2d) 26, 27, 28). If the original bills stood, it would mean that the Board would be under a duty to investigate every union officer as a condition of certification and the delay would be prohibitive. Further, there were many unions who were not suspect. Why investigate all of them?

At this point, the Conference Committee took over and there emerged 9(h). What was its purpose? Did it change the substance of what previously passed both Houses? These questions were asked and the Conference Committee was careful to explain that no change in principle was made or intended (Sen. Taft, 93 Cong. Rec. 6602). Senator Taft explained the Conference Committee's concern that "representation proceedings might be indefinitely delayed," if the Board were under a duty to investigate all affidavits prior to *certification*. The Conference Committee exhibited no concern about delay in the trial of Section 10 proceedings (unfair labor practice cases) or why the language of 9(h): "no complaint shall issue."

Congress knew that in the same section, (d), it had

granted an employer the right to test the validity of a certification in a Section 10 proceeding (29 U. S. C. 159d). We certainly must assume that Congress knew also that a quasi-judicial body such as the Board had the inherent power to protect its processes from abuse (*N. L. R. B.* v. *Indiana & Mich. Elec. Co.*, 318 U. S. 9, 18, 19; *N. L. R. B.* v. *Donnelly Garment Co.*, 330 U. S. 219, 235), and did not derive such power from statutory authority.

Should not the Court of Appeals have construed 9(h) as this Court did in *N. L. R. B.* v. *Dant*, 344 U. S. 375. There the contention was made that 9(h) proscribed the filing by a union of an unfair labor practice charge unless non-Communist affidavits were on file. This Court unanimously rejected the argument, since 9(h) does not by its terms preclude such action. "* * * If Congress had intended to enact such a requirement for the filing of the charge, it would have been a simple matter to have stated 'no charge shall be entertained' " (*id.* p. 379).

9(h) does not say that the Board cannot in any circumstance investigate 9(h) affidavits. When read with the proposed act for which it became a substitute, all it did was to relieve the Board of the duty of investigating the Communistic affiliations of the officers of all unions in representation hearings under Section 9 prior to certification and prior to the issuance of a complaint under Section 10. From this it does not follow that Congress intended that the Board be powerless thereafter to protect itself from false affidavits. As to this, Congress remained silent. If it meant what the Court of Appeals says it meant, it could have said so. If Congress meant to degrade the Board by depriving it of its inherent power to protect its processes from abuse and by requiring it to enforce rights procured through perjury, fraud and deceit, it could have said so. To paraphrase Judge Russell (*N. L. R. B.* v. *Postex Cotton Mills, Inc.*, 181 F. 2d 919, 922), if Congress meant to per-

mit a governmental agency to be used "to promote or sustain any organization or person who believes in the overthrow of the government of the United States by any unconstitutional means," it not only could have, but it should have said so!

4. Further, the denial to the Board of a right to conduct an administrative investigation conflicts with *N. L. R. B.* v. *Highland Park*, 341 U. S. 322. While the question of the power of the Board to investigate union compliance with Section 9(h) was not directly before this Court in that case, the right of an employer to raise questions concerning Section 9(h) compliance in complaint or representation case was there recognized (*id*, 325; *N. L. R. B.* v. *Coca-Cola Bottling Co.* (No. 79, This Term, February 27, 1956), 100 L. Ed. 251, 254). *Highland Park* teaches that in the first instance the Board should determine whether a union "had filed the required affidavits or whether documents filed met the statutory requirements." Can this mean that form, but not substance, is the exclusive inquiry? Must the Board ignore the fact that an affidavit is false?

5. Respondent here is charged with the gravest misconduct, the procuring of the very rights upon which it seeks legal redress by fraud, perjury and deceit. Can 9(h) be intended to preclude the Board from protecting its processes from such abuse (Cf. *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18-19; *N. L. R. B.* v. *Donnelly Garment Co.*, 330 U. S. 219, 235)?

6. And is the Chancellor likewise foreclosed from inquiry into the character of his petitioner? Is an United States Court divested of its historic power to shut its doors to the unclean litigant? The Chancellor spoke his conscience in unequivocal terms (R. 87, 94, 95). In the finest tradition of equity he proposed to proceed promptly (R. 12) to inquire into the character of his suitor (R. 97) when

his hand was stayed by the Court of Appeals. Are we going to require Chancellors to ignore their consciences and give relief in transactions "steeped in perjury and undisclosed knowledge of perjury" (*Precision Inst. Mfg. Co.* v. *Automotive M. Mach. Co.*, 324 U. S. 806, 816) in an area so vital to the public safety? (*A. C. A.* v. *Douds*, 339 U. S. 382, 388, 412, 418, 424-435).

That a court will deny aid when a person invoking that aid has unclean hands is a long settled principle in the United States Courts (*Olmstead* v. *U. S.*, 277 U. S. 438, 483, 484). There, Mr. Justice Brandeis dissenting said:

> "Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for laws; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination * * * The court protects itself."

Unclean Hands is of vital significance when the suit concerns the public interest (*Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492-494).

At bar, respondent seeks to enforce rights under the Act procured by its perjury. Courts were instituted to enforce the law, not its violations. The injunction at bar sanctions and perpetuates fraud, perjury and deceit, of which the law has a long memory. Many weapons in its arsenal has it employed to combat them. In 1787, Chief Baron Eyre wrought Unclean Hands in the Exchequer (*Dering* v. *Earl of Winchelsea*, 1 Cox Eq. 318, 319-320). Unclean Hands should be deployed here to turn back the agents of subversion. By applying it here, this Court will effectuate Congressional purpose and vindicate the judicial process. It will protect itself.

7. Cross-petitioner asserts that respondent, controlled by officers who are members of the Communist Party, with its activities and policies dictated and determined by that

Party, is not and could not be a "labor organization" within the meaning of Section 2(5) of the Act for two reasons:

(1) That Congress did not intend that such an organization be one; and

(2) That even if it did, it could not constitutionally do so.

The Court of Appeals dismissed the argument as "frivolous". Is it "frivolous" to contend that an organization, dominated and controlled by the Communist party is not a labor organization? Congress has vested extraordinary power and authority and given exceptional rights and privileges to those bodies coming within the Congressional definition of a labor organization. A union thus recognized stands in peculiar fiduciary capacity. It is "clothed with power not unlike that of a legislature * * * subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" (*Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 197-198). It is inconceivable that Congress ever intended that a Communist dominated organization exercise quasi-legislative powers over our citizens.

As construed by this Court both the Smith Act and 9(h) proscribe acts designed to serve ultimate revolutionary goals rather than the primary objectives of labor unions (*A. C. A.* v. *Douds*, 339 U. S. 382, 388, 418, 430; *Dennis* v. *United States*, 341 U. S. 494, 509, 547, 564). In determining the meaning of the term "labor organization", Taft-Hartley and Smith should be read in *pari materia* (*United States* v. *Freeman*, 44 U. S. (3 How.) 556, 564; *United States* v. *Stewart*, 311 U. S. 60, 64). When so read, it would be a mockery of Congressional purpose to hold that an organization, dominated and controlled by the Communist Party, is nevertheless a "labor organization" entitled to all of the rights and privileges afforded by the Act. The clear purpose of Congress to eradicate Com-

munism from the labor movement and to repel the attacks of subversion defeats such an interpretation and makes clear that inherent limitation on the definition of a labor organization in the Act.

This precise question was decided by the Canada Labor Relations Board in 1950 in *Branch Lines Limited and Canadian Seamen's Union,* CCH Canada Labor Service, Par. 16,022. There the company sought to have certification of a union revoked on the basis of a certain white paper of the Canadian government indicating that the union was Communist dominated and further pointing out its expulsion from the Canadian Trades and Labor Congress in 1949 on the grounds of Communist domination. The definition of labor organization under the Canadian Act is almost identical to the language of Sec. 2(5). As stated by the Board there, the Canadian Act defines a trade union as "any organization of employees formed for the purpose of regulating relations between employers and employees but shall not include an employer-dominated organization." The Canadian Board refused to certify the union:

> "Regardless of what claim the Respondent may have had at an earlier date to be a trade union within the meaning of the Act, the Board is satisfied for the reasons hereinafter set out that the *Respondent's primary purpose is not such as to bring the organization within the definition of 'trade union' or 'union' in the Act.*
>
> * * * * *
>
> "It is common knowledge in Canada that the Respondent is a Communist-directed organization * * *."
>
> * * * * *
>
> "For the reasons given above, *the Board finds that the Respondent is not a trade union within the meaning of the Act,* and therefore is not entitled to certification as a bargaining agent under the provisions of the Act." (Emphasis supplied.)

Certiorari was denied by the Supreme Court of Ontario,

(1951) 2 D. L. R. 356. The Canada Labor Relations Board exposed and ended the masquerade. Yet to the Court of Appeals, our argument, based upon such authority, is "frivolous".

Further, Congress under the guise of regulating commerce could not constitutionally create within the borders of a state as a labor organization, an organization which threatened the sovereignty and security of the state and the property of its citizens. The so-called plenary power of Congress to regulate commerce under the Commerce clause is, itself, subject to constitutional limitation in that the exercise of this power must be with due regard to the independence and sovereignty of the several states, specifically reserved to them by the Tenth Amendment and guaranteed them by Article IV, Section 4. Any legislation under this Clause which would permit of the legal existence within the borders of a state of an organization, labor or otherwise, which threatened the sovereignty and security of that state and the property of its citizens would be beyond the limits of power delegated to Congress, would not be the supreme law of the land, but null and void, and it would be the duty of the Courts to declare it so (*Gordon* v. *U. S.*, 117 U. S. 697, 705).

Section I of Article II of the Illinois Constitution provides:

> "All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty and the pursuit of happiness. To secure those rights and the protection of property governments are instituted among men deriving their just powers from the consent of the governed."

The fundamental principles, activities and goal of the Communist Party and its agency, the respondent, are completely alien and repugnant to these basic liberties of a free people.

Desirous of protecting its basic charter and the rights of its citizens against the danger of subversion, the Illinois legislature, as early as 1919, passed an anti-Communist statute (Ill. Rev. Stats., 1955, Ch. 38, §§ 558-562,) under the general title of treason, which, *inter alia*, made unlawful advocacy of overthrow by violence or other unlawful means of the government of that state. Thus, the activities of respondent, dominated and controlled as it is by the Communist Party, and the activities of its officers, members of the Communist Party, a "conspiratorial and revolutionary junta," (*A. C. A.* v. *Douds*, 339 U. S. 382, 424), violate both Article II, Sec. I of the Illinois Constitution and Secs. 558-562 of Chap. 38 of its Criminal Code (*People* v. *Lloyd*, 304 Ill. 23, 31; 136 N. E. 505).

In view of the clear mandate of the Illinois Constitution, and legislative implementation by its Criminal Code, how can this subversive organization be constitutionally cloaked with legality by Congressional Act as a "labor organization", under legislation passed for the clear but limited purpose of promoting the full flow of commerce by avoiding industrial strife? (29 U. S. C. 151). The right of free government to self-preservation is the primary and all-encompassing right from which all other rights, powers and privileges spring. When fairly exercised even First Amendment freedoms must yield (*Dennis* v. *United States*, 341 U. S. 494, 501-502). It necessarily follows that Illinois' primary right to self-preservation and the incidental right to protect the lives and property of its citizens, reserved under the Tenth Amendment and guaranteed by Article IV, section 4, cannot constitutionally be threatened by Congressional action under its power to regulate commerce.

Nothing in *Pennsylvania* v. *Nelson* (No. 236, This Term, April 2, 1956), 100 L. Ed. 415 militates against the inherent power of a State to protect *its own sovereignty and integ-*

rity and *the property of its citizens* against the danger of subversion. All the case could hold upon its facts is that Pennsylvania could not prosecute for subversive acts directed against the Federal Government. Certainly there is nothing in Taft-Hartley disabling a state from having a labor policy of its own in the field of subversion. If Illinois may protect its shopkeepers from fear of bombings (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294), may it not protect itself and all of its citizens from "a conspiratorial and revolutionary junta" masked in the armor of a labor organization?

We must bear in mind the nature of this "union", a Communist organization controlling over 100,000 citizens (R. 3). Through its agents, also members of the Communist Party, it controls the activities of each and every local union in many states,—activities dictated and determined by Party policies. One of those policies is to "regard strikes and other forms of direct action designed to serve ultimate revolutionary goals as the primary objectives of labor unions." (*A. C. A.* v. *Douds*, 339 U. S. 382, 388.) The goal is to "seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate" (*id.*, p. 425). "Violent and undemocratic means are the calculated and indispensable methods" to attain that goal (*id.*, p. 429), which is to be accomplished in part "by acquiring control of the labor movement" (*id.*, p. 430). Then the "union" (*id.*, p. 430)

> "finds itself a more or less helpless captive of the Communist Party. Its officers cease to be interested in correcting grievances but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter and disruptive. They always follow the Communist Party line, without even knowing its source or its objectives. The most promising course of the Communist Party has been the undercover capture of the coercive power of strategic labor unions as a

leverage to magnify its power over the American people." (*id.*, p. 431.)

We must face up to the issue. On whom does the impact of those activities primarily fall? Whose property is most immediately affected? Who suffers from the quickie strikes, these drills but rehearsals of the final show? Who first sustains the loss incident to the "political strike"? Does the State become powerless in the face of this danger to its security and the property of its citizens because Congress has legalized within its borders as a "labor organization" an instrument whose goal is to destroy it? "Communist leaders of labor unions (have) in the past and (will) continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government" (*id.*, p. 388) or they will not. Are we to assume that they will not, until the *fait accompli* teaches us otherwise? And are we to assume that the *fait accompli* will not result from their control of the labor movement in the face of the expressions of our courts and the history of Czechoslovakia and others (*Dennis* v. *U. S.*, 341 U. S. 494, 566)?

We may well meditate upon the following from Judge Learned Hand when the Second Circuit affirmed *Dennis* (183 F. 2d 201, at p. 213):

> "We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities. The only justification which can be suggested is that in spite of their efforts to mask their purposes, so far as they can do so consistently with the spread of the gospel, discussion and publicity may so weaken their power that it will have ceased to be dangerous when the moment may come. That may be a proper enough antidote in ordinary times and for less redoubtable combinations; but certainly it does not apply to this one. *Corruptio optimi*

pessima. True, we must not forget our own faith; we must be sensitive to the dangers that lurk in any choice; but choose we must, and *we shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe.* Nothing short of a revived doctrine of *laissez faire,* which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression. We hold that it is danger 'clear and present'." (Emphasis supplied.)

This is but imagery if the net result is that Congress under the guise of regulating commerce may legalize within the borders of a state an organization whose leaders and policies are committed to the destruction of that state by violence and other undemocratic methods as speedily as circumstances permit and as dictated by a foreign power. Is it possible that the Commerce Clause can be constitutionally applied so as to threaten or impair the state's last vestige of personality, its right to preserve its sovereignty and security and the property of its citizens?

Apposite here is *Albertson* v. *Millard,* 106 F. Supp. 635 (3 Judge Ct.), judgment vocated, 342 U. S. 242, sustaining the constitutionality of the Michigan Trucks Act which required registration of Communist organizations. On p. 641, Mr. Chief Judge Simons said:

"In a major aspect of the problem, it has unequivocally been held in *Dennis* v. *U. S.,* 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137, that it is within the power of the Congress to protect the Government of the United States from armed rebellion where the existing structure of the government provides for peaceful and orderly change and the principle of governmental helplessenss in the face of preparation for revolution is categorically rejected. *It must follow that the states in their sovereign capacity, have not only like*

power but an equal obligation to prohibit acts intended to overthrow their governments by force and violence, if the means employed are reasonable. This is the teaching of *Gitlow* v. *New York,* 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138, approved and relied upon in *Dennis,* 341 U. S. 506, 71 S. Ct. 857. The states will no longer exist if the federal government is overthrown, just as the government will perish if the states are destroyed. *Moreover, the states are the first line of defense and,* if sabotage and revolution strike, reason and judment counsel that they will as likely strike at great industrial centers, such as are contained in Michigan, as at the seat of government itself. *The state cannot be helpless in seeking to avert catastrophe''* (Emphasis supplied).

The Commerce Clause must be read with the Tenth Amendment, which reserves to the states their inherent right of sovereignty, and Article IV, Section 4 which proclaims that if a state cannot protect its sovereignty the Federal Government will. Certainly the Framers never intended that Congress have power to legalize within a state an organization which threatens the sovereignty and security of the state and the property of its citizens, whether it masquerades as a labor union or otherwise.

If First Amendment freedoms must yield to the power of federal constitutional government to survive (*A. C. A.* v. *Douds,* 339 U. S. 382), so must the power to regulate commerce yield to the power of the state to preserve itself and the property of its citizens, reserved it by the Tenth Amendment and guaranteed by Article IV, Section 4. Respondent cannot constitutionally be a labor organization within the meaning of 2(5) of Taft-Hartley, and thereby enjoy ''power not unlike that of a legislature'', derived from Federal grant, to further within the borders of a state its revolutionary conspiracy.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this cross-petition for a writ of certiorari should be granted.

Barnabas F. Sears,
James M. Barnes,
Counsel for Cross-Petitioner.

APPENDIX A.

Statutes.

Section 2(5) of the National Labor Relations Act (29 U. S. C. 152):

"*Definitions.*

When used in this subchapter—

* * * * *

(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employement, or condition of work."

Section 9(h) of the National Labor Relations Act (29 U. S. C. 159h):

"Representatives and elections * * *

* * * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of Sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits."

APPENDIX B.

Opinions Below.

District Court Orders.

UNITED STATES DISTRICT COURT.

For the District of Columbia.

International Union of Mine, Mill and Smelter Workers, *Plaintiff*, *vs.* Guy Farmer, et al., *Defendants.*	Civil Action No. 583-55

Findings, Conclusions and Order.

This cause come on to be heard on plaintiff's application for a temporary restraining order and its motion for a preliminary injunction, and on defendant's opposition thereto. After hearing the parties and examining the complaint and the other papers filed therein, it appears to the Court that:

1. This suit seeks to obtain review of and set aside administrative determination and order of the National Labor Relations Board, issued on February 1, 1955, finding that plaintiff union has not in fact complied with the requirements of Section 9(h) of the National Labor Relations Act and, therefore, is not entitled to benefits thereunder.

2. The principal irreparable injury alleged by plaintiff as necessitating a stay of the Board's determination and order is its denial to plaintiff of a place on the ballot in an election scheduled to be conducted by the Board on February 14, 1955, among the employees of the American Platinum Works, Case No. 2-RC-7089.

On the basis of the foregoing the Court hereby concludes that:

1. It is doubtful whether the Court has jurisdiction of the subject matter of the action.

2. In any event, there is no showing of such irreparable injury as would warrant the interim injunctive relief requested. This is particularly clear in the light of the fact that the election in the American Platinum case or any other action taken therein could be set aside were this Court ultimately to decide that the Board's administrative determination of plaintiff's noncompliance were erroneous.

Order.

WHEREFORE, it is by the Court ordered that:

1. Plaintiff's application for a temporary restraining order and its motion for a preliminary injunction be and they are hereby denied.

2. The hearing on plaintiff's request for a permanent injunction be and it is hereby advanced to February 21, 1955.

Signed this eleventh day of February, 1955.

James R. Kirkland,
United States District Judge.

UNITED STATES DISTRICT COURT.

For the District of Columbia.

International Union of Mine, Mill and Smelter Workers, *Plaintiff*, *vs.* Guy Farmer, et al., and Precision Scientific Company, *Defendant-Intervenor.*	Civil Action No. 583-55.

Order.

Pursuant to the Mandate of the Circuit Court of Appeals for the District of Columbia Circuit, dated November 10, 1955, and received December 9, 1955, and upon consideration of different orders covering the Mandate presented by opposing counsel, and after argument of counsel, it is by the Court this 13th day of January, 1956, ORDERED.

That in accordance with said Mandate the judgment heretofore entered on February 11, 1955, denying a preliminary injunction, be and the same is hereby reversed and held for naught, and the case is hereby restored to the non-jury calendar for the trial of issues not covered by the said Mandate.

James R. Kirkland,
Judge.

Court of Appeals Opinion, Judgment, and Order.

UNITED STATES COURT OF APPEALS.

For the District of Columbia Circuit.

No. 12573.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, *Appellant*,

vs.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATION BOARD, *Appellees*,

AND

PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, *Intervenor*.

APPEAL FROM THE UNITED STATES DISTRICT COURT.

For the District of Columbia.

Decided November 10, 1955.

Before: EDGERTON, *Chief Judge*, and WASHINGTON and BASTIAN, *Circuit Judges*.

Per Curiam: The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*, ... U. S. App. D. C. ....., 221 F. 2d 862, decided February 15, 1955.

REVERSED.

UNITED STATES COURT OF APPEALS.

For the District of Columbia Circuit.

No. 12,573.

OCTOBER TERM, 1955.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, *Appellant*,

vs.

GUY FARMER, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATION BOARD, *Appellees*,
PRECISION SCIENTIFIC COMPANY, AN ILLINOIS COMPANY, *Intervenor*.

APPEAL FROM THE UNITED STATES DISTRICT COURT.

For the District of Columbia.

Before: EDGERTON, *Chief Judge*, and WASHINGTON and BASTIAN, *Circuit Judges*.

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: November 10, 1955.

PER CURIAM.

United States Court of Appeals.

For the District of Columbia Circuit.

No. 12,573.

January Term, 1956.

International Union of Mine, Mill and Smelter Workers, *Appellant*,

vs.

Guy F. Farmer, et al., as Members of the National Labor Relations Board, *Appellees*,
Precision Scientific Company, *Intervenor*.

Before: Edgerton, *Chief Judge*, and Washington and Bastian, *Circuit Judges*.

Order.

Whereas appellant's motion filed herein February 27, 1956, for issuance of a mandate by this Court in this case and for other action to effectuate the judgment of this Court entered herein November 10, 1955, duly came on for hearing before this Court and was argued by counsel; and

Whereas it appears from said motion filed in this Court February 27, 1956, and from the transcript of the proceedings before the District Court on January 13, 1956, that pursuant to said judgment of this Court entered November 10, 1955, this appellant submitted to the District Court a proposed order for a preliminary injunction to carry out the judgment of this Court but that after a hearing thereon the District Court refused to enter a preliminary injunction but instead on January 13, 1956, ordered the case "restored to the non-jury calendar for the trial of issues not covered by" the judgment of this Court; and

Whereas said motion filed in this Court on February 27, 1956, may be treated by this Court, as the equivalent of the taking of an appeal from the order of January 13, 1956, in so far as that order refuses a preliminary injunction, thus giving this Court jurisdiction to review the refusal of the District Court to issue a preliminary injunction in this case (See *Gerringer* v. *United States*, 93 U. S. App. D. C. 403, 213 F. 2d 346 (1954); *West* v. *United States*, 94 U. S. App. D. C. 46, 222 F. 2d 774 (1954); *R. F. C.* v. *Prudence Group*, 311 U. S. 579 (1941); *Lemke* v. *United States*, 346 U. S. 325 (1953)); or may be treated as a petition for writ of mandamus to compel the District Court to issue a preliminary injunction in this case; or may be treated as a motion to modify the judgment of this Court entered herein November 10, 1955; and

Whereas in the consideration of this appeal prior to the rendition of its opinion and judgment on November 10, 1955, this Court had before it sufficient material in the record from which it could and did conclude:

(1) that the contention that the appellant lacks "clean hands" was not a sufficient reason for the denial of a preliminary injunction in this case;

(2) that the District Court failed to reconsider its order on appeal herein in the light of the decision of this Court in *Farmer* v. *International Fur and Leather Workers Union*, 95 U. S. App. D. C. 308, 222 F. 2d 862, decided February 15, 1955, four days after the entry of the order of the District Court on appeal herein;

(3) that the contention that the appellant was not "a labor union" within the meaning of §2(5) of the National Labor Relations Act, 1947, was frivolous and did not constitute a reason for the denial of a preliminary injunction in this case; and

(4) that the contention that the affidavit in support of appellant's request for a preliminary injunction was improperly executed or was inadequate in any

material respect would appear unsupported in the circumstances of this case;

Now, therefore, the Court having duly considered the foregoing matters, and no suggestion having been made by appellees that any reason exists for the denial of a preliminary injunction other than as reflected in the contentions enumerated above, or that circumstances have in the interim changed in any material respect, and the Court being of the view that the end result, namely, requiring the issuance of a preliminary injunction, would be the same whether the motion filed herein February 27, 1956, be treated as the equivalent of the taking of an appeal or as a petition for writ of mandamus, or for amendment of our judgment of November 10, 1955, we conclude that "to secure the just, speedy, and inexpensive determination" of this action (Rule 1, Federal Rules of Civil Procedure), justice will be best subserved by amending our judgment entered November 10, 1955, so as to require the District Court to issue a preliminary injunction as we intended, and as was issued by the District Court in *Farmer* v. *International Fur and Leather Workers Union*, which ruling this Court affirmed and which we relied on in our opinion of November 10, 1955, in this case.

Accordingly, it is ordered by the Court that the last paragraph of the judgment of this Court entered herein November 10, 1955, be, and it is hereby, amended by striking out the words "for further proceedings not inconsistent with the opinion of this Court" and inserting in lieu thereof the words "with directions to issue a preliminary injunction."

It is further ordered by the Court that the certified copy of the judgment of this Court dated November 10, 1955, in this case which issued to the District Court on December 9, 1955, be, and it is hereby, recalled.

It is further ordered by the Court that the Clerk be, and he is hereby, directed to issue a mandate to the District Court in this case on March 28, 1956.

PER CURIAM.

Dated: March 15, 1956.

FILE
MAY 9
HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 99 76

PRECISION SCIENTIFIC COMPANY, *Petitioner*,

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKER, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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